OAH 58-3100-22334-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Michael W. Tuominen, Petitioner

v.

Minnesota Gambling Control Board, Respondent

RECOMMENDATION ON THE SUMMARY DISPOSITION MOTION OF THE MINNESOTA GAMBLING CONTROL BOARD

This case arises out of the State shutdown, which began on July 1, 2011. As of that date, most State employees were laid off. The shutdown occurred because the State had not approved an operating budget for the biennium commencing July 1, 2011. The budget issue was subsequently resolved, and State employees, including the Petitioner, returned to work on July 21, 2011, once funding was approved.

The Petitioner is an employee of the Minnesota Gambling Control Board (the Board) who was laid off during the shutdown. The Petitioner filed a Petition for Relief under the Minnesota Veterans Preference Act (VPA) regarding his layoff. He contends that the layoff resulted from the State's lack of good faith in failing to enact a biennial budget. He also maintains that, because the Board has its own funding source, its employees should not have been laid off.

A prehearing conference was held on October 11, 2011 at the Office of Administrative Hearings. The Petitioner appeared on his own behalf. Tom Barrett, Executive Director for the Board appeared on the Board's behalf. Subsequently, Assistant Attorney General Kristyn Anderson filed a Notice of Appearance as attorney for the Board.

On October 12, 2011, the ALJ issued an order requiring the Parties to file written argument regarding their positions. In response to the Petitioner's filing, the Board moved to dismiss the Petitioner's claims. Because the Board's dismissal motion was accompanied by an affidavit and exhibits, the ALJ has treated the motion as one for summary disposition.

Based on the filings and records herein, and the arguments of the Parties,

IT IS HEREBY RECOMMENDED THAT:

1. The Department of Veteran Affairs **GRANT** the Board's motion for dismissal**.**

2. The Department of Veteran Affairs **DENY** the Petitioner's request for relief under VPA.

Dated: January 6, 2012

s/Linda F. Close
LINDA F. CLOSE
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Commissioner of Veterans Affairs, Veterans Service Building, Minnesota Department of Veterans Affairs, 20 West 12th Street, Second Floor, St. Paul, Minnesota 55155-2006, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Issues Presented

The Petitioner has requested relief under the VPA. He asserts that the State's failure to enact funding for the biennium, resulting in the shutdown, was not done in good faith. He further contends that, because the Board is financed through a special funding mechanism, its employees should not have been laid off.

Summary Disposition Standard

The Board moved to dismiss the Petitioner's claims. An affidavit and exhibits accompanied the Board's brief in support of its motion. It is therefore appropriate to treat the Board's motion as one for summary disposition.[1] Summary disposition is the administrative equivalent of summary judgment.[2] Summary disposition is appropriate when there is no genuine dispute as to the material facts of a contested case, and the law applied to those undisputed facts clearly favors one of the parties.[3] The moving party carries the burden of proof to establish that there are no genuine issues of material fact that would preclude disposition of the case as a matter of law.[4] Further, when considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the nonmoving party.[5] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.

In order to defeat an otherwise proper motion for summary disposition, the non-moving party must show the existence of material facts that are genuinely disputed.[6] A genuine issue is one that is not either a sham or frivolous and a material fact is a fact whose resolution will affect the result or outcome of the case.[7]

Undisputed Facts

The Petitioner is an honorably discharged veteran employed by the Board. By a memorandum dated June 10, 2011, the Petitioner received from Minnesota Management & Budget (MMB) a notice about a potential layoff in July. Funding for the coming biennium had not been approved, and a shut down was anticipated. The MMB notice informed Petitioner he would be laid off unless the Department told him he should report to work to perform critical services.[8]

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[1] Minn. R. Civ. P. 12.02.
[2] *See Pietsch v. Mn. Bd. of Chiropractic Examiners,* 683 N.W.2d 303, 306 (Minn. 2004).
[3] *See Sauter v. Sauter,* 70 N.W.2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).
[4] *See Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[5] *See Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn. 1993); *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. App. 1984).
[6] *See Murphy v. Country House, Inc.,* 240 N.W. 2d 507, 511-12 (Minn. 1976); *Borom v. City of St. Paul,* 184 N.W.2d 595, 597 (Minn. 1971).
[7] *See, e.g., O'Malley v. Ulland Bros.,* 549 N.W.2d 889, 892 (Minn. 1996).
[8] Petitioners' Ex. A.

Prior to the shutdown, the Governor assembled a task force to recommend which State functions should continue to be funded in the event of a shutdown. On June 15, 2011, the Attorney General requested that the Ramsey County District Court issue an Order to permit funding of certain State functions recommended by the Governor. By a June 29, 2011, Order, the District Court ordered that only critical core government functions be funded during the shutdown. The Court attached to its order an exhibit that designated critical functions for funding during the shutdown. As to the Board, the Court adopted the Governor's recommendation that the entire Board remain closed during the shutdown.[9] Consequently, as of July 1, 2011, all Board employees, including its executive director, were laid off.[10]

The Veterans Preference Act

Disposition of this matter necessarily begins with the VPA. Minn. Stat. § 197.46 provides:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be **removed** from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.[11]

The protections of the VPA have existed in Minnesota since 1907.[12] The VPA was inspired by the Legislature's conviction that veterans have earned preference in public employment by virtue of their having served this country in times of peril.[13] Over the years, the Supreme Court has had many occasions to consider the aims and effects of the VPA. From the cases, three key principles emerge.

First, the VPA is intended to limit the grounds on which a public employer may terminate the employment of a veteran, so that arbitrary removal of a veteran cannot occur. A termination must be "for cause" [14] or, as phrased in the VPA, may occur only upon a showing either of misconduct or incompetence.[15] To these two statutory bases for termination, judicial precedent has created a third basis. A public employer may abolish a veteran's position if the action is taken in good faith.[16]

Second, notwithstanding the VPA, public employers maintain the right to control their own administrative affairs. Thus, for example, the VPA does not restrict the right of a public employer to create temporary employment positions that are not

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[9] *In re Temporary Funding of Core Functions of the Executive Branch of The State of Minnesota,* 62-CV-11-5203 (District Court, Second Judicial District, June 29, 2011) at Petitioners Appendix 146.
[10] Affidavit of Tom Barrett (Barrett Affid.) ¶ 5.
[11] Minn. Stat. § 197.46 (emphasis added).
[12] *See* Act of Apr. 19, 1907, ch. 263 §§ 1, 2, 1907 Minn. Laws 355.
[13] *See Winberg v. University of Minnesota*, 499 N.W. 2d 799 (Minn. 1993).
[14] *Gorecki v. Ramsey County,* 437 N.W. 2d 646, (1989).
[15] Minn. Stat. § 197.46.
[16] *See Young v. City of Duluth*, 386 N.W. 2d 732, 738-9 (Minn. 1986).

subject to the VPA.[17] Similarly, a public employer may reclassify a position as an exercise of its administrative authority, as long as the decision to reclassify is one of substance and not mere form.[18]

Third, an employee is not considered "removed" from employment merely because the employee experiences a work stoppage. Although the statute does not define the term "removal," the Court's decisions illuminate that term. The Court regards a demotion, for example, as a removal.[19] The same is true of placing a veteran on indefinite medical leave.[20] But a suspension is not a removal, because a suspension contemplates a return to work following the period of suspension. Suspension is thus distinguished from dismissal, in that the latter entails a complete end of employment.[21] The Court has expressly held that "a veteran is removed from his or her position or employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job."[22]

The Petitioner Was Not Removed From His Position

Applying this law to the undisputed facts of this case leaves no doubt that the Petitioner was not removed from his position. The layoff notice received by the Petitioner explained that he was being placed on an unpaid leave of absence, unless his positions entailed "critical services." The notice explained that some employees might be recalled to perform these critical services during the shutdown. Finally, the layoff notice informed employees that their insurance coverage would continue during the shutdown, unless they elected otherwise.[23]

Based on the notice, the Petitioner must have understood that the layoff was temporary. The State, after all, continued to pay his health insurance premiums, an action that forcefully speaks to the State's intention to retain the Petitioner as an employee. It was never likely or probable during this period that the Petitioner would be unable to go back to work. At the end of the shutdown, the Petitioner and all other Board employees returned to their jobs at the Board.[24]

Under these circumstances, the ALJ concludes that the Petitioner was not "removed" from his position within the meaning of the VPA. And removal is the trigger for relief under the VPA. Because there was no removal, there can be no relief under the VPA.

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[17] *Crnkovich v. Independent Sch. Dist. No. 701, Hibbing*, 273 Minn. 518, 141 N.W.2d 284 (1966) (seasonal employment as a carpenter is not governed by VPA); see also *McAfee v. Department of Revenue,* 514 N.W. 2d 301 (Minn. App 1994) (VPA does not apply to a temporary, unclassified attorney position).
[18] *Myers v. City of Oakdale,* 409 N.W. 2d 848 (Minn. 1987); *see also Taylor v. City of New London,* 536 N.W.2d 901 (Minn. App. 1995), rev. denied Oct. 27, 1995.
[19] *Leininger v. City of Bloomington*, 299 N.W. 2d 723, 726 (Minn. 1980).
[20] *Myers*, 409 N.W.2d at 851.
[21] *Wilson v. City of Minneapolis*, 283 Minn. 352, 354, 168 N.W.2d 19, 22-23 (1969).
[22] *Myers,* 409 N.W.2d at 850-51.
[23] Petitioners' Ex. A.
[24] Barrett Affid. ¶ 6.

The Petitioner's Position Was Not Abolished

The Petitioner argues the State's lack of "good faith" in shutting down its operations for a three-week period. This assertion may stem in part from the MMB layoff notice, which advised the Petitioner that he had rights under the VPA and that the issue at any VPA hearing would be whether the layoff was "done in good faith and for a legitimate purpose."[25]

To the ALJ's knowledge, the Court has applied the good faith grounds for dismissal only when a public employer has abolished a veteran's position. None of the cases apply this analysis to a removal, much less a temporary layoff, especially one involving the entire State workforce. The good faith analysis comes into play when a public body eliminates an individual veteran's position as a sham, when the real purpose is to terminate the veteran's employment.

It cannot be seriously contended that the shutdown was a ruse to deprive the Petitioner of his employment. All Board employees were laid off during the three-week shutdown. Thus, veterans and non-veterans alike suffered the effects of the absence of State funding.

Apart from the "good faith" language in the VPA notice portion of the MMB layoff notice, nothing in the layoff notice suggests that the Petitioner's position was being abolished and, indeed, it was not abolished. On July 21, 2011, the Petitioner and all his colleagues returned to their position at the Board. Because the State did not abolish the Petitioner's position, it must be concluded that the good faith analysis does not apply here.

The Existence of the Board's Special Fund Is Not Dispositive in This Matter

The Petitioner's good faith argument is also based on his belief that the Board has a special fund, the existence of which meant that Board employees should have been exempted from the shutdown. Laying off Board employees when the special fund had money to pay those employees evidences the State's bad faith, in the Petitioner's view. The ALJ has rejected this argument for two reasons.

First, while it is true that the Board receives funds based on fees it imposes and these fees lie in a dedicated fund, the fund is available to the Board only if the Legislature authorizes access to these funds through a biennial appropriation.[26] The shutdown occurred precisely because the biennial budget had not been enacted by July 1, 2011. Without the appropriation, the Board had no funds on which to operate. The Petitioner's argument is thus built on a false premise.

Second, the ALJ also rejects the special fund argument because it is not pertinent in a case brought under the VPA. The Board is an executive branch agency subject to the Governor's control. Prior to the shutdown, the Governor, as

[25] Petitioners' Ex. A.
[26] Minn. Stat. § 349.151, subd. 4(d); Barrett Affid. ¶ 3.

the State's chief executive, assembled a task force to plan for emergency funding of State services in the event of a shutdown. The task force recommended that only critical core functions of government should be funded during a shutdown.[27] The task force did not recommend that funding be based on the availability of special funds. It focused on critical government functions.

On June 15, 2011, the Attorney General commenced an action in the Ramsey County District Court to ensure that the critical State functions identified by the task force would be funded during the shutdown. In that action, the Governor provided the District Court with the task force's recommendations for state agency funding. The District Court adopted those recommendations, for the most part.[28]

In presenting the task force's recommendations, the Governor did not ask the court to allow any funding at all for the Board's work. The Court adopted the recommendation that the Board not be funded during the shutdown, with the result that all Board employees were laid off.

The VPA does not constrain administrative planning for an emergency like a shutdown, particularly when that planning has been ordered by a court. The Petitioner, had he been among the emergency planners, may have devised a different plan than the one recommended by the Governor and ordered by the Court. But the existence of alternatives for providing State services during the shutdown does not prove a violation of the VPA. On the contrary, the existence of alternatives exemplifies the rationale for the Supreme Court's decisions allowing a public body to administer its affairs without running afoul of the VPA.[29] For these reasons, the ALJ rejects the Petitioner's argument about the availability of special fund monies.

Conclusion

The VPA does not provide relief for the Petitioner under the circumstances of this case. During the State shutdown, the Petitioner was not removed from his position within the meaning of the VPA, nor was his position abolished, so as to trigger a good faith analysis under the VPA. The availability of a special fund is not an issue in this matter because the Board's special fund monies had not been appropriated to it. For all these reasons, the ALJ recommends the Commissioner of Veteran Affairs grant the Board's motion for summary disposition.

L. F. C.

[27] *In re Temporary Funding of Core Functions of the Executive Branch of The State of Minnesota,* 62-CV-11-5203 (District Court, Second Judicial District, June 29, 2011) ¶ 7.
[28] *See id.* at ¶ 28.
[29] *See* footnotes 17-18, *supra*.